United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7654

IN THE

United States Court of Appeals

For the Second Circuit

B

CLARENCE H. McSHAN,

Plaintiff-Appellant,

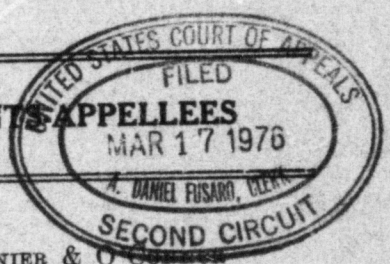
vs.

P/s

OMEGA LOUIS BRANDT ET FRERE, S.A. and SOCIETE SUISSE POUR L'INDUSTRIE HORLOGERE MANAGEMENT SERVICES, S.A.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York



BRIEF FOR DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes:

PAGE

28 U.S.C.

Federal Rules of Civil Procedure:

New York Civil Practice Law and Rules:

Secondary Authority:

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Issues Presented for Review

I. Where neither of the defendants owns, uses or possesses any real property or maintains any office, bank account, mailing address, telephone listing, warehouse, stock of goods, or agent in the State of New York, and where defendants' watches are distributed in this country by a wholly independent legal entity which purchases the

watches f.o.b. Switzerland, was the decision of the Court below, holding that neither defendant does business in New York so as to be subject to the jurisdiction of its courts, erroneous?

II. Where the contract in suit was a patent sublicense agreement negotiated entirely by mail and executed in Switzerland, was the decision of the Court below, holding that neither defendant has transacted business in New York in relation to the contract in suit so as to be subject to the jurisdiction of its courts, erroneous?

III. Where, more than two years after the present cause of action arose, officers of defendant SSIH, not a party to the original contract, came to New York to participate in negotiations concerning a proposed substitute license agreement, which agreement was never consummated, was the decision of the Court below, holding that neither defendant has transacted business in New York in relation to the contract in suit so as to be subject to the jurisdiction of its courts, erroneous?

IV. Where the defendants have without trial or adjudication consented to entry of judgment in a wholly unrelated antitrust action in the Southern District of New York, which judgment specifically provides that it shall not constitute evidence or an admission of any issue of fact or law contained therein, have the defendants consented to or conceded the jurisdiction of the courts of New York in this action?

V. Where plaintiff in the present suit is a resident of either New York or Texas, where each of the defendants is a citizen of Switzerland and not a citizen of New York,

where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and where the procedure for removal was properly complied with, was the decision of the Court below refusing to remand the action to the Supreme Court of Queens County erroneous?

Statement of the Case

This action for breach of contract was commenced on February 26, 1975 in the Supreme Court of the State of New York, Queens County, by service of a summons and complaint on the defendants at their principal offices in Bienne, Switzerland. The complaint, alleging breach of a patent sublicense agreement between defendant Omega Louis Brandt et Frere, S.A., and plaintiff's assignor, American Railroad Curvelining Corporation, demanded $300,000, exclusive of interest or costs. On March 26, 1975, the defendants removed this action to the United States District Court for the Eastern District of New York by filing a petition and bond as required by 28 U.S.C. §1446. Jurisdiction was based upon diversity of citizenship under 28 U.S.C. §1332. On March 31, 1975, defendants moved to dismiss the complaint for lack of jurisdiction over the person and for insufficiency of service of process under Rules 12(b)(2) and (5) of the Federal Rules of Civil Procedure. Plaintiff then cross-moved to remand the action to the Supreme Court, Queens County, from which it had been removed. By memorandum and order of the Honorable Mark A. Costantino, U.S.D.J., dated November 14, 1975, the Court granted defendants' motion to dismiss the complaint and denied plaintiff's cross-motion to remand. A judgment of dismissal was entered on November 17, 1975. On November 28, 1975, the plaintiff filed a notice of appeal to this Court.

Statement of the Facts

Defendant Omega Louis Brandt et Frere, S.A. (Omega), a Swiss corporation having its principal office and place of business at Bienne, Switzerland, manufactures and sells watches bearing the trademark OMEGA (5a).[1] Defendant Societe Suisse Pour L'Industrie Horlogere Management Services, S.A. (SSIH), also a Swiss corporation having its principal office and place of business at Bienne, Switzerland, is commonly owned with Omega and provides certain management services to the latter, but is otherwise not involved in the events leading to this action (5a, 17a).

Neither defendant transacts any business or owns any real or personal property within the State of New York (16a). In particular, neither of the defendants owns, uses or possesses, or has owned, used or possessed any real property within the State of New York. Further, neither of the defendants has maintained or is maintaining any office, bank account, mailing address, telephone listing, warehouse, stock of goods, or agent in the state of New York (12a). Defendant Omega's watches are distributed in the United States by the Norman M. Morris Corporation (Morris), a New York corporation having its principal place of business at 301 East 57th Street, New York City (17a). Morris is neither owned nor controlled by either Omega or SSIH, but is a wholly independent legal entity. The relationship between Omega and Morris is that of supplier and purchaser; Morris purchases the watches f.o.b. Switzerland (13a). Morris is also licensed to use the trademark OMEGA in the United States and is listed in the New York

1. The suffix "a" refers to pages in the Appendix for Appellant.

telephone directory under the names "Omega Watch Company" and "Omega Watch Company Services" (19a-20a).

Plaintiff Clarence H. McShan (McShan), now believed to be a resident of Texas, is the registered owner of a number of United States and foreign patents relating to watch movements (45a). On February 18, 1970, McShan, then a resident of Northport, Long Island, entered into a license agreement with American Railroad Curvelining Corporation (ARC), then having a place of business in Douglaston, Long Island, whereby the latter acquired the exclusive right (subject to certain minor exceptions) to manufacture, use, and sell the inventions embraced by the McShan patents, and to sublicense them (4a-5a). By an agreement dated March 6, 1970 (the Sublicense Agreement), ARC in turn sublicensed the McShan patents to Omega on substantially the same terms as the original license, but at a higher royalty (29a). The Sublicense Agreement between ARC and Omega was negotiated and executed by mail, the last act of execution, Omega's signing, having taken place in Switzerland (17a). Morris, Omega's U. S. distributor, took no part either in the negotiations or in the execution of the Sublicense Agreement. Believing that it has incurred no liability under the Sublicense Agreement, Omega has refused to make any payments to either ARC or McShan on account of said agreement except for an initial payment of $10,000.[2] ARC has since assigned to McShan any rights it may have under the Sublicense Agreement with Omega, which agreement is the subject of the present action (7a).

2. Petition for Removal, filed March 26, 1975, at 3.

ARGUMENT

I

Neither of the defendants does business in the State of New York.

It is well settled that in an action removed from a state court, the jurisdiction of the federal court over the parties depends on the existence of such jurisdiction before removal. *Friedr. Zoellner (New York) Corp.* v. *Tex Metals Co.*, 396 F.2d 300, 301 (2d Cir. 1968). Accordingly, the question of personal jurisdiction turns on whether defendants Omega and SSIH were properly served in the action instituted in the Supreme Court of the State of New York, Queens County. Both of the defendants were served with the original papers at their principal offices in Bienne, Switzerland, under the provisions of Section 313 of the New York Civil Practice Law and Rules (CPLR), which permits out-of-state service upon persons "domiciled in the state or subject to the jurisdiction of the courts of the state under [CPLR] section 301 or 302."

Generally speaking, New York law provides two alternative predicates for the exercise of personal jurisdiction over a foreign corporation in a contract action. First, if a corporation's activities within the state are of such a continuous and substantial nature as to amount to "doing business," the corporation may be served out of state under the provisions of CPLR 313, "doing business" being one of the jurisdictional bases embraced by CPLR 301.[3]

3. CPLR 301 provides that a court may exercise "such jurisdiction over persons . . . as might have been exercised heretofore." This section has been held to represent "a reaffirmance of preceding case

(footnote continued on next page)

The second general predicate for the exercise of personal jurisdiction is supplied by CPLR 302, the New York "long-arm" statute. This statute provides in part that where a nondomiciliary "transacts any business within the state," the court may exercise personal jurisdiction as to a cause of action "arising from" such transaction of business. CPLR 302(a)(1). We submit that neither of these jurisdictional bases exists in this case. As we will show, neither defendant "does business" in New York State within the meaning of CPLR 301. Further, this action does not arise from the "transaction" of business within the state as the term is used in CPLR 302(a)(1).

Turning now to the first of these predicates, the classic basis for the exercise of personal jurisdiction has been physical presence within the state. In the case of corporations, the question of "presence" has traditionally been answered by looking at the corporation's activities within the state and deciding whether those activities amount to "doing business." In the words of Judge Cardozo of the New York State Court of Appeals:

> "We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it is here. If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, it is within the jurisdiction of our courts." *Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915 (1917).

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law which had defined the power of New York courts to exercise in personam jurisdiction, including the classic 'doing business' test applied to foreign corporations." *Potter's Photographic Applications Co.* v. *Ealing Corp.*, 292 F.Supp. 92, 99 (E.D.N.Y. 1968).

Although *Tauza* was decided before such decisions as *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945), which enlarged upon the constitutionally permissible bases for the exercise of personal jurisdiction, the New York courts have continued to apply the classical "doing business" test, absent a specific statutory provision to the contrary. *Potter's Photographic Applications Co.* v. *Ealing Corp., supra* at 99; *Simonson* v. *International Bank,* 14 N.Y.2d 281, 287-88, 251 N.Y.S.2d 433, 438, 200 N.E. 2d 427 (1964).

To constitute doing business, the local activities sought to bind a foreign corporation must not only be substantial in sense of rising above "mere solicitation," *Miller* v. *Surf Properties, Inc.,* 4 N.Y. 2d 475, 480, 176 N.Y.S.2d 318, 321, 151 N.E.2d 874 (1958), but must also affirmatively appear to be performed on the foreign corporation's behalf. The New York courts have repeatedly and unequivocally held that where the only local activities are those of an independent distributor acting on its own behalf, the foreign manufacturer is not "doing business" in New York. In the words of one court:

> "It was determined at an early date in the state that where a manufacturer sells outright to a retailer, and in return the retailer merely agrees to certain promotional schemes, this is in effect a true sale. The retailer does not become the wholesaler's agent. . . . Again in this case, the distributors might be loosely called 'sales agents.' *But, in reality, they were independent distributors acting in their own interest under their own discretion and without power to bind the manufacturer.*" *Central School District No. 2* v. *C. R. Evans Corp.,* 49 Misc. 2d 924, 268 N.Y.S.2d 800, 804-05 (Sup. Ct. 1966) (emphasis added).

The question of whether the activities of an independent distributor may be attributed to a foreign manufacturer was also presented in *Standard Wine & Liquor Co.* v. *Bombay Spirits Co.*, 25 App. Div. 2d 236, 268 N.Y.S.2d 602, 603 (1st Dep't 1966), *aff'd*, 20 N.Y.2d 13, 281 N.Y.S.2d 299, 228 N.E.2d 367 (1967). Plaintiff therein was a local distributor which had entered into a distributorship agreement with the foreign manufacturer (Bombay) and its U.S. importer and distributor (Penrose). The importer-distributor Penrose was licensed to do business in New York and was concededly subject to the jurisdiction of the court. In a suit for breach of this distributorship agreement, the Appellate Division rejected plaintiff's claim that Bombay "did business" through its "agent" Penrose:

> "Quite clearly Penrose was not defendant's agent. It bought goods from defendant which it then sold to others, including plaintiff, at an advanced price. No clearer instance of an independent contractor could be imagined." 268 N.Y.S.2d at 604.

The court also held that the defendant did not do business in New York merely because its goods entered New York commerce. 268 N.Y.S.2d at 603.

Any doubt as to whether this traditional rule had been weakened by recent New York cases expanding personal jurisdiction was removed by the New York Court of Appeals decision of *Delagi* v. *Volkswagenwerk AG of Wolfsburg, Germany*, 29 N.Y.2d 426, 328 N.Y.S.2d 653, 278 N.E. 2d 895 (1972). There, too, a foreign manufacturer having a local distributor was sued on a cause of action that arose out of state. Defendant Volkswagenwerk AG (VWAG), a German corporation, manufactured automobiles that were

then imported to this country by its wholly owned subsidiary, Volkswagen of America (VWoA), a New Jersey corporation. Neither the German parent nor the New Jersey subsidiary had qualified to do business in New York or had an office or place of business in New York. VWoA resold the cars to wholesale distributors, one of whom, World-Wide, reshipped the cars to independent local dealers. World-Wide, which concededly did business in New York, was not a subsidiary or otherwise controlled by either VWAG or its New Jersey-based importer. The Court of Appeals held unanimously that World-Wide was not defendant's "agent" and that VWAG was not subject to the jurisdiction of the New York courts:

> "In the case before us, however, the undisputed facts do not give rise to a valid inference of agency. Concededly World-Wide is an independently owned corporation, in no way directly related to VWAG, and related to VWoA only by way of a 'Distributor Agreement.' Under this agreement, World-Wide purchases Volkswagen automobiles and parts outright from VWoA, takes possession at dock in Newark, New Jersey, and resells same to local Volkswagen dealers in its franchise area of New York, New Jersey and Connecticut. *Where, as here, there exists truly separate corporate entities, not commonly owned, a valid reference of agency cannot be sustained.*" *Id.* at 431, 328 N.Y.S.2d at 656 (emphasis added).

Significantly the court added:

> "[M]ere sales of a manufacturer's product in New York, however substantial, have never made the foreign corporation manufacturer amenable to suit in this jurisdiction." *Id.* at 432, 328 N.Y.S.2d at 657.

The *Delagi* court also considered the question of whether the controls allegedly exercised by the defendant over World-Wide constituted the latter as the defendant's agent. These controls related to, among other things, minimum sales by dealers, design of service departments, training of service personnel, uniform purchase and sales prices, and prior approval of perspective dealers. The court held that even if plaintiff's assertions in this respect were true, World-Wide did not become defendant's agent:

> "This Court has never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship. . . . The control over the subsidiary's activities, we held, must be so complete that the subsidiary is, in fact, merely a department of the parent. . . . Even if World-Wide were a subsidiary of VWAG, which it is not, the alleged control activities of VWAG would not be sufficient to make World-Wide a mere department of VWAG." *Id.*

Delagi and the other cases discussed above make it clear that defendant Omega does not "do business" in New York merely because it has a local distributor. Plaintiff continues to argue to the contrary, however, by combining misleading and unsupported statements of fact with irrelevant and deceptively stated propositions of law.

Plaintiff asserts, for example, that defendant Omega "transacts large quantities of business through saturation marketing in multiple retail outlets in and around New York City"; the Court is asked to take "judicial notice" of defendant's "transaction" of business in the New York metropolitan area (Brief for Appellant[4] at 7). No support

4. Hereinafter cited as Brief.

is offered for these bald assertions, even though they relate to the ultimate fact in issue.

Plaintiff then blandly asserts, totally without justification, that defendants' moving papers "admit and concede" an "exclusive agency relationship" with the Norman M. Morris Corporation (Brief at 7). Quite the contrary, the portion of the moving papers to which he refers (13a), far from "admitting" or "conceding" such a relationship, explicitly states that Morris is a "wholly independent legal entity" and that the relationship between Omega and Morris is that of "supplier and purchaser."

Conclusory statements of the type indicated above fairly permeate plaintiff's brief; to point out every single example would merely be cumulative. At no time does plaintiff ever attempt to explain *why* Morris is Omega's agent. Apparently it is felt that mere repetition is enough. Plaintiff's total failure to discharge his burden of proof in this respect left the District Court no choice but to dismiss the complaint for lack of personal jurisdiction. As one court in this Circuit has stated it:

> "[P]laintiff cannot by a 'bland assertion' that [certain persons] were the agents of the individual defendants confer personal jurisdiction over the individual defendants upon this court. . . . *The burden of pleading and proving jurisdiction is upon the party asserting its existence.*" *Unicon Management Corp.* v. *Koppers Co.*, 250 F. Supp. 850, 852 (S.D.N.Y. 1966) (emphasis added).

Plaintiff's contentions concerning "doing business" have been equally specious on the law. Specifically, plaintiff has relied upon factually inapposite cases and even

here has had to take statements out of context to make the desired point. These cases will be discussed *seriatim*.

Notwithstanding the clear, unequivocal holding of the *Delagi* case that the mere sale of a corporation's products in New York has never made a corporation amenable to process, plaintiff cites *Singer* v. *Walker*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68, *cert. denied*, 382 U.S. 905 (1965), for the contrary proposition (Brief at 11-12). However, plaintiff neglects to mention that *Singer* did not even examine the question of whether the defendant was doing business under CPLR 301. Rather, the court held that the defendant, by such sales, was *transacting* business under CPLR 302 so as to subject the defendant to personal jurisdiction in a product liability suit *arising from the shipment of a defective product into New York State*. Plaintiff also fails to point out the opinion's explicit recital that, in an earlier action against the same defendant, service was set aside on the ground that the defendant was not doing business in New York. The attempt to apply the facts of *Singer* v. *Walker, supra*, to the present case simply ignores the plain requirement of CPLR 302 that the action "arise" from the acts allegedly conferring jurisdiction. *Fontanetta* v. *America Board of Internal Medicine*, 421 F.2d 355, 357 (2d Cir. 1970).

Car Freshner Corp. v. *Broadway Manufacturing Co.*, 337 F. Supp. 618 (S.D.N.Y. 1971), also cited for the same proposition (Brief at 12), has even less pertinence to the present case. That action was a tort action for trademark infringement under 15 U.S.C. §1114; jurisdiction was not predicated on "sales" as such, but on CPLR 302(a)(3),

which permits the exercise of personal jurisdiction over a defendant who "commits a tortious act without the state causing injury to person or property within the state," if the defendant derives "substantial revenue" from goods used or consumed in the state. Since this provision applies only to tort actions, the case is clearly irrelevant. Plaintiff herein is suing in contract and has not alleged any such "tort" in his complaint or elsewhere. Even if plaintiff's claim for royalties were to be couched in "tort" language, which it is not, CPLR 302(a)(3) would not apply to what is clearly a contract action. This action may not be recast to sound in tort merely by alleging, without a shadow of basis in fact, that defendant Omega "never meant" to carry out its promises. *Stanat Manufacturing Co.* v. *Imperial Metal Finishing Co.*, 325 F. Supp. 794 (E.D.N.Y. 1971).

Plaintiff has cited *Parke-Bernet Galleries, Inc.* v. *Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970), for the proposition that even the acts of a transitory agent in New York State can subject the principal to the jurisdiction of its courts (Brief at 13-14). From this plaintiff argues that Morris's presence in this state for nearly forty years leaves "no question" as to jurisdiction over the defendants. Plaintiff's reasoning here simply begs the question. To say that Morris's relationship with the defendants was longer than the "transitory" relationship in *Parke-Bernet* does not answer the threshold question of whether the relationship is one of principal and agent.

To the same effect is *Uniroyal, Inc.* v. *Heller*, 65 F.R.D. 83 (S.D.N.Y. 1974), also cited for the proposition that a nonresident defendant may be jurisdictionally bound by

the acts of a local agent (Brief at 15). Again, plaintiff needlessly belabors the general rule that local acts of an agent can confer jurisdiction while failing to supply the essential premise that Morris *is* such an agent.

In any event, *Parke-Bernet* and *Uniroyal* are clearly distinguishable on their facts. Unlike the "borrowed servant" in *Parke-Bernet* or the negotiating attorney in *Uniroyal*, Morris does not act either under defendants' control or in defendants' behalf, but is an independent contractor acting for his own account and profit.

Plaintiff cites this Court's decision in *Galgay* v. *Bulletin Co.*, 504 F.2d 1062 (2d Cir. 1974), for the proposition that a "formal agency relationship" is not necessary to impute Morris's activities to the defendants. Subsequent New York cases make it clear, however, that while the agency relationship necessary to confer jurisdiction over a foreign corporation need not conform to common law notions of agency, there must be some showing that the local entity is acting on the foreign corporation's behalf. Recently, a New York court summarized the applicable law as follows:

> "Accordingly, common law precepts of agency are not conclusive in determining whether a particular operative is an 'agent' for the purpose of CPLR 302(a)(1). Instead, it seems to turn on the question of for whose account or substantive benefit the transaction is conducted. For whose ultimate purpose was the business transacted? If chiefly for his principal's purpose, the principal is jurisdictionally bound by those acts. . . . Elman v. Belson, 32 A.D.2d 422, 302 N.Y.S.2d 961. It is where the operative acts on his own, in pursuance of his own distinct interests and not as an extension of the foreign corporation, that his

> acts cannot be changed to the nondomiciliary in finding jurisdiction." *Traub* v. *Robertson-American Corp.*, 82 Misc.2d 222, 368 N.Y.S.2d 958, 963-64 (Sup. Ct. 1975).

In each of the New York cases cited in the *Galgay* opinion, it affirmatively appears that local acts were performed on a foreign defendant's behalf. In *Elman* v. *Belson*, 32 App. Div. 2d 422, 302 N.Y.2d 961 (2d Dep't 1969), the defendant was an Illinois resident whose attorneys, also residents of Illinois, had come to New York and had retained local attorneys to sue on previously obtained judgments. In an action by the local attorneys for the reasonable value of services rendered, the court held that defendant's Illinois attorneys had come to New York as his "agents." In *Legros* v. *Irving*, 77 Misc.2d 497, 354 N.Y.S.2d 47 (Sup. Ct. 1973), a defamation action, the defendant had entered into an agreement with an author whereby the latter would "make all possible efforts" to exploit the defendant's life story and would share approximately half of the proceeds. The court held that the author's acts of promoting the defendant's life story were for the latter's benefit and under his control and were thus performed by the author acting as the defendant's agent. 354 N.Y.S.2d at 50. In the instant case, by contrast, plaintiff has not shown any agency relationship, much less a formal agency relationship.

In any event, plaintiff's reliance on the *Galgay* opinion as establishing the applicable law of agency is misplaced. The Court in that case held that the defendants were *not* subject to personal jurisdiction, even assuming the existence of an "agency" relationship.

Margaret Watherston, Inc. v. *Forman*, 73 Misc.2d 875, 324 N.Y.S.2d 744 (App. T. 1973), cited by plaintiff (Brief at 16) for the proposition that jurisdiction my be based on the "combination" of shipment of goods into New York and dealings in New York "through an agency", is wholly inapposite. Both the shipment of goods and the local dealings referred to above were related to the matter in suit, and jurisdiction was based on CPLR 302 (the long-arm statute) rather than upon "doing business". Further, it has not been shown that the defendants in the present action deal "through an agent" in New York so as to bring themselves within the language of the holding even if it were otherwise applicable.

Longines-Wittnauer Watch Co. v. *Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68, *cert. denied*, 382 U.S. 905 (1965), decided concurrently with *Singer* v. *Walker*, *supra*, and relied upon by the *Watherston* court, is similarly inapposite. Again, all of the local transactions were related to the matter in suit, and "agency" or "doing business" were not even in issue.

Doumaux v. *Gurney*, 363 F.Supp. 1209 (E.D.N.Y. 1973), a tort action arising out of the allegedly fraudulent promotion of franchises, is also readily distinguishable from the present case. In that action, the defendant, a race car driver, licensed the use of his name and photograph to a corporation for the purpose of franchising automotive service centers. The corporation was entitled to use the defendant's signature on its promotional literature. Letters sent to prospective franchisees bore the endorsement "Dan Gurney, Director." The defendant had the right of prior approval over all promotional material bearing his name

and was required to make personal appearances in the promotional campaign. The court held, on these facts, that the corporation was the defendant's "agent" for the purposes of long-arm jurisdiction under CPLR 302(a)(3).

Doumaux does not involve a true distributorship, as do *Delagi* and in the present case, but rather involves the sale of franchises through what in effect is a corporate shell. Further, to the extent that *Doumaux* is inconsistent with *Delagi*, the latter case must clearly control.

Incredibly, plaintiff now cites the "unanimous" holding of the New York Appellate Division in *Delagi* on the question of agency (Brief at 19-20). Plaintiff conveniently neglects to mention that this decision was reversed by the New York Court of Appeals, and that this reversing decision was equally unanimous. *Delagi, supra.* Apparently plaintiff is asking this Court to overrule the New York Court of Appeals' interpretation of its own state's law!

Frummer v. *Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 281 N.Y.S.2d 41, 227 N.W.2d 851, *cert. denied*, 389 U.S. 923 (1967), is also readily distinguishable from the present case and was specifically distinguished from the case of an independent distributor in the *Delagi* case. In *Frummer*, the defendant, a London hotel operator, had a New York affiliate which performed various publicity and reservation services. The affiliate both accepted and confirmed reservations at the defendant's hotel. The court concluded from this that the affiliate did "all the business which [the defendant] could do were it here by its own officials" and therefore acted as the defendant's agent. *Frummer, supra* at 537, 538, 281 N.Y.S.2d at 44, 45. The "inference" of

agency was strengthened, in the court's view, by the fact that the reservation service was commonly owned with the defendant and was operated on a non-profit basis. *Id.* at 538, 281 N.Y.S.2d at 45.

The facts in *Frummer* could not be more opposed to the facts in the case at bar. Morris is not authorized to do any business on Omega's behalf, much less "all the business" Omega could do "were it here by its own officials." Further, the other indicia of agency present in the *Frummer* case, the common ownership of the reservation service and its operation on a non-profit basis, are clearly lacking in the instant case.

Finally, plaintiff seeks to distinguish *Delagi* on the ground that, while *Delagi* was an action for personal injuries, the present case is an action breach of contract (Brief at 20). Defendants fail to understand the relevance of such a distinction, since the question of "doing business" is determined without regard to the particular cause of action sued upon. Furthermore, given the apparent solicitude of the New York courts towards actions for personal injuries, the distinction, if any, should operate in defendants' favor.

In conclusion, plaintiff's contentions respecting the existence of an "agency" relationship between defendant Omega and its distributor, Morris, are totally without merit. It is respectfully submitted that defendant Omega and, *a fortiori*, defendant SSIH are not doing business in New York through Morris and are therefore not subject to the jurisdiction of the New York courts in a wholly unrelated cause of action.

II

The negotiation and execution of the contract in suit did not constitute the transaction of business in New York.

CPLR 302(a)(1), the New York long-arm provision applicable to this action, provides:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state."

Although jurisdiction under this provision does not require "doing business" in the traditional sense and may even be based on a single act, this provision was never meant to confer jurisdiction over causes of action merely because they may "relate" in some way to New York State. In each case, there must be

> "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *McKee Electric Co.* v. *Rauland-Borg Corp.*, 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34, 229 N.E.2d 604 (1967), *quoting Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

New York case law has made it quite clear that a nonresident does not invoke "the benefit and protections of its laws" merely by concluding a contract by mail with a New York resident. A leading case is *Kramer* v. *Vogl*, 17 N.Y.2d

27, 267 N.Y.S.2d 900, 215 N.E.2d 159 (1966), an action for fraud by a New York distributor against an Austrian manufacturer. The distributorship agreement giving rise to the suit was arrived at orally in Paris and confirmed in a letter mailed from Austria to New York. All shipments from the manufacturer to the distributor were f.o.b. European ports. The New York Court of Appeals held unanimously that the defendant had not transacted business in New York.

> "The issue boils down to whether the phrase 'transacts any business within the state' covers the situation of a nonresident who never comes into New York State but who sells and sends goods into the State pursuant to an order sent from within the State. . . .
>
> "Despite the comparative liberality with which we have construed the first paragraph of subdivision (a) of 302 we do not think that the facts displayed here show the case within that paragraph. The cause of action here sued upon cannot be said to have arisen out of any transaction of business in the State." *Id.* at 31-32, 267 N.Y.S.2d at 903, 904.

In accord with *Kramer* v. *Vogl, supra,* is *McKee Electric Co.* v. *Rauland-Borg Corp., supra,* another action brought by a local distributor against a nonresident manufacturer.

And in *Agrashell, Inc.* v. *Bernard Sirotta Co.*, 344 F.2d 583 (2d Cir. 1965), this Court, even assuming that CPLR 302 was to be construed to its constitutional limit,[5] stated

5. As this Court has noted in *Galgay* v. *Bulletin Co., supra* at 1066, later New York decisions have not construed CPLR 302 to its constitutional limit. Plaintiff's suppression of these qualifying remarks while using the *Galgay* case can only be viewed as deliberate.

that it failed to see in what material respect the third party defendant

> "invoked the benefit and protection of New York law merely by negotiating and concluding good contracts through the mails and by telephone with persons residing in New York." *Id.* at 587.

Plaintiff does not attempt to distinguish from these cases, but instead has relied on misleading if not irrelevant statements of fact. Plaintiff claims, for example, that the Sublicense Agreement on which the present suit is based was "executed in the City and State of New York" (Brief at 4). Plaintiff has offered no support for this assertion and, in fact, his assertion is specifically contradicted by the supporting papers submitted with defendants' original motion to dismiss (17a). As these papers show, the Sublicense Agreement was executed outside of New York, the last act of signing having taken place in Switzerland. Defendants thus did not transact any business in New York in relation to the contract in suit, either in person or through an "agent." While plaintiff's assignor did sign the contract in New York, this was *not* the *defendants'* act, and it is well settled that a plaintiff may not rely on his own acts within the state to obtain jurisdiction. *Haar* v. *Armendaris Corp.*, 31 N.Y.2d 1040, 342 N.Y.S.2d 70, 294 N.E.2d 855 (1973), *rev'g mem.* 40 App. Div. 2d 769, 337 N.Y.S.2d 285 (1st Dep't 1972); *Parke-Bernet Galleries, Inc.* v. *Franklyn, supra* at 19 n.2, 308 N.Y.S.2d at 341-42 n.2, 256 N.E.2d at 509 n.2.

Plaintiff has insistently (Brief at 6-7, 8, 10) referred to the choice-of-law provision in the Sublicense Agreement, which states that the agreement is to be "construed" and

"governed" in accordance with N v York law (39a). The relevance of this choice-of-law provision to the issues presented on this appeal is not readily understood, since it has been well established that such a provision does not confer jurisdiction under CPLR 302(a)(1). *Agrashell, Inc.* v. *Bernard Sirotta Co., supra* at 588; *Franklin National Bank* v. *Krakow*, 295 F.Supp. 910, 918 (D.D.C. 1969).

While plaintiff has cited[6] a number of cases purportedly upholding long-arm jurisdiction, all of these cases are readily distinguishable on their facts. *Car-Freshner Corp.* v. *Broadway Manufacturing Co., supra*, and *Doumaux* v. *Gurney, supra*, were both tort actions in which personal jurisdiction was predicated on CPLR 302(a)(3), one of the "tortious act" provisions of the New York long-arm statute. In each of the *Impex, Longines* and *Uniroyal* cases cited by the plaintiff, it appears that either the employees or the attorneys of the defendants were physically present in New York during negotiations of the contract in suit.

In *Margaret Watherston, Inc.* v. *Forman, supra*, an action for payment for restoration work performed on a painting, the additional contact, not present here, was the defendants' shipment of the painting to be restored into New York, where the work was done. Moreover, as the dissent points out, the fact that the court based jurisdiction in part on the *plaintiff's* acts in the state raises a substantial doubt as to whether the holding of the case would

6. Plaintiff's indiscriminate mixing of the logically distinct issues of "doing business" generally and "transacting business" with respect to the matter in suit has made it difficult to determine the issue for which a particular case is being cited. The text discusses those cases which in fact construe CPLR 302, whether or not specifically cited as such.

be followed by the New York Court of Appeals. *Cf. Haar* v. *Armendaris Corp., supra.*

Parke-Bernet Galleries, Inc. v. *Franklyn, supra,* can only be described as being *sui generis.* There the nonresident defendant participated in a New York auction by telephone, using one of plaintiff's employees as a "borrowed servant" at the New York end.

Finally, plaintiff insists that he is being "injured in New York" by the importation of watches into this State upon which royalties allegedly due have not been paid (Brief at 21). The short answer to this contention is that, since the plaintiff is suing in contract, the place of "injury" is irrelevant to the question of personal jurisdiction. *Stanat Manufacturing Co.* v. *Imperial Metal Finish Co., supra* at 795-96. In any event, Omega's liability under the Sublicense Agreement was conditioned on the *manufacture* of watches covered by the patents and not on their *sale* (31a). Since any watches "manufactured" within the meaning of the agreement were manufactured in Switzerland, any "injury" in the sense of events giving rise to liability occurred there and not in New York.

Nor does the fact that payments under the Sublicense Agreement may have been expected in New York make the defendants amenable to suit.[7] As one New York court has noted, when presented with a similar fact situation:

> "The activity in which the defendants engaged in this jurisdiction . . . was not of that special quality

7. It should also be noted that defendant Omega is not required by the Sublicense Agreement to make royalty payments in New York, but is merely required to make such payments "in the United States" (32a).

> sufficient to render them subject to personal jurisdiction in this State. New York was not chosen as the place of payment . . . to enable the defendants to avail themselves of the privilege of doing business in this State. The choice of New York as the place of payment was to accommodate the payee . . . Commercial benefit did not accrue to the defendant by fixing the place of payment in New York, nor was the protection of our laws bargained for." *Wirth* v. *Prenyl, S.A.*, 29 App. Div. 2d 373, 288 N.Y.S. 2d 377, 379 (1st Dep't 1968).

Federal courts have followed the principle set out in the *Wirth* decision:

> "[W]e fail to see, on the facts alleged by Defendant, in what material respect [defendant's descendant] invoked the benefits and protections of New York law by arranging a loan through the mails and by telephone that the persons residing in New York and by agreeing to mail payments to New York." *Franklin National Bank* v. *Krakow, supra* at 919.

In conclusion, plaintiff has failed to show that the defendants have invoked the benefits and protections of New York law in any respect in relation to the contract in suit. It is respectfully submitted, therefore, that the District Court correctly held that the defendants have not "transacted business" in New York as it is defined by CPLR 302.

III

The participation by defendant SSIH in New York negotiations in relation to a proposed substitute agreement did not constitute the transaction of business concerning the agreement in suit.

By referring to SSIH's participation in discussions, held in New York, concerning a possible substitute license agreement (45a-46a) plaintiff impliedly argues that these discussions constitute the "transaction of business" in regard to the contract at suit (Brief at 22). We fail to see any logical basis for such an assertion. The New York negotiations took place in December 1972 (45a), more than two years after the liability under the original contract allegedly began to accrue.[8] An action can hardly be said to "arise" from a transaction that had not even occurred when the action accrued. Further, the participant in these negotations was not Omega, the party to the original contract, but SSIH, a stranger to the contract. The fact that SSIH was seeking to substitute itself for Omega as a party to the contract negatives any possible inference that SSIH was acting as Omega's "agent."

Even if Omega itself had participated in the negotiations, and such negotiations had preceded the accrual of this action, the result would be no different, for a similar situation was presented in *McKee Electric Co.* v. *Rauland-*

8. The contract, dated March 6, 1970 (29a), provides for the payment of royalties within 45 days after each calendar half-year during the term of the agreement (32a). Thus, the first payment would have been due August 14, 1970. Plaintiff, who has asked for "interest from March 6, 1970" (8a), has apparently pushed back the date of accrual even further.

Borg Corp., supra. In that case, a local distributor of sound equipment sued his Illinois supplier for, *inter alia,* breach of the distributorship agreement. Although the parties transacted most of their business by mail, defendant on one occasion sent two representatives into New York to help settle a dispute between the plaintiff and several local consulting engineers concerning specifications for sound systems. Both representatives participated in a two-hour conference with the plaintiff and others, while one of the representatives visited one of the engineering groups on several occasions. The New York Court of Appeals held that these acts did not constitute the transaction of business in New York:

> "There is no fixed standard by which to measure the minimal contacts required to sustain jurisdiction under the provisions of CPLR 302 (subd. [a], par. 1). However, it seems to us the contacts here, rather than being minimal, were so infinitestimal, both in the light of *Hanson* v. *Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L. Ed.2d 1283 and *Longines-Wittnauer Watch Co.* v. *Barnes & Reinecke,* 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68, that jurisdiction of the New York Courts cannot be sustained. Otherwise, every corporation whose officers or sales personnel happen to pass the time of day with a New York customer in New York runs the risk of being subjected to the personal jurisdiction of our Courts." *Id.* at 381-82, 283 N.Y.S.2d at 37.

Here, too, the contacts with New York are so infinitesimal that jurisdiction cannot be sustained. Not only did the transaction take place more than two years after the action arose, but the party to the transaction was not even the party to the original contract. Plaintiff's contentions in this respect are thus wholly without substance.

IV

Neither of the defendants has consented to or conceded the jurisdiction of the court.

In an obvious effort to salvage a meritless case, plaintiff now attempts to predicate personal jurisdiction on a wholly unrelated action pending in the Southern District of New York. We submit that plaintiff's contentions are frivolous and are totally lacking in substance.

The suit to which plaintiff refers, Civil Action No. 76 Civ. 495, was filed on January 30, 1975 by the United States under Section 4 of the Sherman Act (15 U.S.C. §4) against Norman M. Morris Corporation, Norman M. Morris Associates, Inc. (another corporation owned by Morris the individual), Omega, SSIH, and CHS Tissot et Fils, S.A. (an affiliate of Omega and SSIH). The complaint in this action (the Complaint) alleges that certain aspects of Morris's exclusive U.S. distributorship arrangement with Omega and Tissot, formalized in agreements executed in 1973, violate Section 1 of the Sherman Act (15 U.S.C. §1). All of the parties have stipulated to the entry of a consent judgment (Final Judgment), entry of which now awaits the expiration of the 60-day period mandated by Section 2(d) of the Antitrust Procedures and Penalties Act (15 U.S.C. §16(d)).[9] One of the jurisdictional allegations in the Complaint is that the defendants Omega, SSIH, and Tissot "transact business" in New York within the meaning of

9. The Complaint and Final Judgment in this action are now before this Court. Plaintiff's motion for leave to file a supplementary appendix to include these materials, dated February 26, 1976, was granted by an order of this Court, per Judge Meskill, dated March 6.

CPLR 302 and 15 U.S.C. §22, the antitrust corporate venue statute.

Plaintiff now argues that by consenting to the entry of a consent judgment in that case, the defendants have "consented to" the jurisdictional allegations contained in the Complaint (Brief at 21). This argument is totally without merit. By its very terms, the Final Judgment does not purport to adjudicate any of the substantive or procedural allegations of the Complaint, but is only concerned with the prospective relief. The judgment thus specifically recites, at page 1, that its entry has been consented to "without trial or adjudication of any issue of fact or law herein *and without this final judgment constituting evidence or admission by any party with respect to any such issue*" (emphasis added). To say that this judgment was meant to have a binding effect with respect to anything other than the prospective relief described therein is to ignore the plain language of the judgment and the intent of the parties. As the Supreme Court once noted in a leading decision:

> "Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit . . . a judgment entered with the consent of the parties may involve a determination of questions of fact and law by the Court, but unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties." *United States* v. *International Building Co.*, 345 U.S. 502, 506 (1953); *accord*, *Tyson* v. *New York City Housing Authority*, 369 F.Supp. 513, 518 (S.D.N.Y. 1974).[10]

10. Even if this were a private antitrust action based on the same set of facts, plaintiff could not use the consent decree even as *prima facie* evidence of "matters respecting which said . . . decree would be an estoppel as between the parties thereto." 15 U.S.C. §16(a).

Nor can it seriously be argued that the Final Judgment contains "admissions" of any matter not adjudicated. The recitation of jurisdiction at page 2 of the Final Judgment only states that the District Court has jurisdiction over the parties "with respect to *this action*" (emphasis added). Further, the basis for such jurisdiction is clearly the consent of the parties and not any of the acts referred to in paragraph 2 of the Complaint. The judgment specifically recites at page 1 that the defendants have "submitted themselves to the jurisdiction of this court."

Moreover, even if the jurisdictional allegations of transaction of business were conceded, which they are not, these allegations only concern the transaction of business with respect to the matter in suit. The present action having no relation to those transactions concerning Morris's distributorshop, the truth or falsity of the jurisdictional allegations is irrelevant. It should also be noted that the complaint alleges, as an alternative basis for personal jurisdiction, that the defendants transact business within the state within the meaning of 15 U.S.C. §22. This provision, which has no counterpart in New York law, has been construed to apply to the mere shipment of goods to customers within the district, even if unrelated to the subject matter of the litigation. *United States* v. *Burlington Industries, Inc.*, 247 F.Supp. 185, 187 (S.D.N.Y. 1965). The possibility that the defendants may be amenable to service of process under 15 U.S.C. §22 is irrelevant. In an ordinary diversity case, there is no "federal standard" for personal jurisdiction; amenability to suit is determined solely in accordance with the law of the state where the federal court sits. *Arrowsmith* v. *United Press International*, 320 F.2d 219, 225 (2d Cir. 1963).

In sum, the "new evidence" with which plaintiff is so apparently obsessed simply establishes that the defendants have appeared in another action pending in the Second Circuit, which action may have other predicates for personal jurisdiction. The mere fact of appearance is irrelevant here, however, for the principle that a defendant appearing in an action submits to the jurisdiction of the court in that action only, and not in unrelated causes of action held by other, unrelated parties is so well founded as not to require extended argument. *Ex parte Indiana Transportation Co.*, 244 U.S. 456 (1917).[11] Even if the defendants were natural persons and had come to the State of New York to participate in the merits of the antitrust action, they would not be subject to service of process or to the jurisdiction of the New York courts in another unrelated matter. *Stewart* v. *Ramsay*, 242 U.S. 128 (1916). *A fortiori*, no such basis for jurisdiction exists in the present case.

To summarize, the Final Judgment is by its very terms not even intended as evidence, much less a conclusive determination of the allegations contained in the Complaint. Further, the transaction of business referred to in the Complaint, even if conceded, does not relate to the subject matter of this suit. And finally, the mere fact of appearance in the antitrust action does not, as a substantive matter, confer jurisdiction in the present suit. Thus, the assertion that the defendants have "consented" to allegations of transaction of business is simply baseless.

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11. New York case law decided after the enactment of the CPLR is in accord on this point. Thus, in *Matter of Einstoss*, 26 N.Y.2d 181, 309 N.Y.S.2d 184, 257 N.E.2d 637 (1970), the New York Court of Appeals held that the defendant's appearance in an action to foreclose a mortgage did not confer jurisdiction with respect to a totally unrelated cross-claim interposed by a codefendant. CPLR 302(c) codifies this concept by providing that where personal jurisdiction is based solely on the New York long-arm statute, an appearance confers jurisdiction only with respect to causes of action enumerated therein.

V

This action was properly removed from the state court in which it was originally brought.

Plaintiff's contention that this case should be remanded to the state court is even less meritorious than his contentions concerning personal jurisdiction. Plaintiff does not deny that federal diversity jurisdiction exists in this case, as indeed he cannot. Each of the defendants is a Swiss corporation having its principal place of business in Switzerland. Plaintiff is a citizen of either New York or Texas, while plaintiff's assignor is a New York corporation having its principal place of business in New York. The amount in controversy, exclusive of interest and costs, is $300,000. All of the requirements both for original diversity jurisdiction under 28 U.S.C. §1332 and removal jurisdiction under 28 U.S.C. §1441 are clearly satisfied.

Plaintiff continues to insist, however, that this action should have been remanded. The only case cited for this contention is *Weinberg* v. *Colonial Williamsburg, Inc.*, 215 F.Supp. 633 (E.D.N.Y. 1963), a case decided under the New York Civil Practice Act. There, Judge Zavatt ruled that the defendants were not subject to the personal jurisdiction of the federal court and had not waived their jurisdictional objections in the federal court by removing the action from the state court. Nevertheless, the court remanded the case to the state court on the possibility the state court's jurisdiction may be broader, the basis for the District Court's conjecture being two New York cases, decided in 1893 and 1916, which held that the filing of a re-

moval petition constituted a general appearance waiving all jurisdictional objections. *Id.* at 637, 641.

It is clear, however, that whatever the New York law on waiver was when *Weinberg* was decided, a removal does not constitute a waiver under the CPLR, which has since superseded the Civil Practice Act. Under the present law, a defendant may appear by serving an answer or a notice of appearance, making a corrective motion under CPLR 3024, or making a motion to dismiss under CPLR 3211. CPLR 320, 3024(c), 3211(f). Having performed none of these acts up until the time of removal, the defendants can hardly be said to have appeared or to have waived jurisdictional objections in the New York action. Further, at least one federal court that has considered the matter has concluded that under the present CPLR, a removal does not waive jurisdictional objections under state law. *Wurtenberger* v. *Cunard Line Ltd.*, 370 F.Supp. 342, 343 (S.D.N.Y. 1974). Procedure after removal is, of course, governed by the Federal Rules of Civil Procedure, under which jurisdictional objections are preserved. *Id.*, Fed. R. Civ. P. 12(h)(1), 81(c).

Further evidence that the rule of the *Weinberg* case has not survived the enactment of the CPLR is provided by the many cases in this Circuit in which the defendants removed the action from the New York State Court and thereafter successfully moved to dismiss for lack of jurisdiction. *E.g., Friedr. Zoellner (New York) Corp.* v. *Tex Metals Co., supra; Chertok* v. *Ethyl Corp. of Canada*, 341 F.Supp. 1251 (S.D.N.Y. 1972); *A. M. Simon Co.* v. *William McWilliams Industries, Inc.*, 286 F.Supp. 564 (S.D.N.Y. 1968). If the

Weinberg rule were still the law, remand would have been justified in any one of these cases. The failure of the plaintiff in these cases even to suggest the applicability of the *Weinberg* rule strongly suggests that it is no longer the law. As Judge Neaher of the Eastern District of New York has recently noted, remand is a proper procedure only where the court lacks jurisdiction over the subject matter. Where the defect relates to jurisdiction over the person, as it does here, the proper remedy is dismissal. *Amins* v. *Life Support Medical Equipment Corp.*, 373 F. Supp. 654, 656 (E.D.N.Y. 1974).

The assertion that there is a "distinct possibility" that the state court may be able to exercise a "broader reach" of jurisdiction than the federal court (Brief at 22) simply does not conform to fact. Rule 4(e) of the Federal Rules of Civil Procedure, which took effect after the *Weinberg* decision, provides that federal process may be served on nonresidents in any manner authorized by rule or statute of the state in which the court sits. This rule may be relied upon in either an original or a removed action. 28 U.S.C. §1448. If there is any substance to plaintiff's jurisdictional contentions, then, he has ample opportunity to test them in the federal courts.

Plaintiff seems to argue that, if the contract in suit is deemed to have been executed in New York, removal is improper (Brief at 22). The short answer to this contention is that the citizenship of a corporation, for the purpose of diversity jurisdiction, is determined solely by the state of incorporation or the state embracing the principal place of business, either of which is Switzerland in this case. 28

U.S.C. §1332(c). That a corporation may be "doing business" or "transacting business" within the forum state is simply immaterial to the question of diversity of jurisdiction or right of removal. *Nassau Sports* v. *Peters*, 352 F.Supp. 867, 870 (E.D.N.Y. 1972); *Bartlett* v. *Hudson Hosiery Co.*, 183 F.Supp. 1, 2 (E.D.N.Y. 1960).

Plaintiff also appears to argue that the Sublicense Agreement's choice-of-law provision bars removal of the present action (Brief at 23). Again, the position taken by the plaintiff is squarely contradicted by the law. *Wiesenberger Services, Inc.* v. *Response Analysis Corp.*, 365 F. Supp. 258 (S.D.N.Y. 1973); *Sears Roebuck & Co.* v. *Glenwal Co.*, 325 F.Supp. 86, 89 (S.D.N.Y. 1970), *aff'd mem.*, 442 F.2d 1350 (2d Cir. 1971).

Finally, there is the residual implication from the tone of plaintiff's brief that remand is somehow a discretionary procedure and should be used to dispose of cases such as the present case that are, as plaintiff puts it, "above all a question of New York law." We submit that the suggestion of a "discretionary" power to remand in this case has no legal basis whatever. The notion that the right to remove in a proper case is less than absolute has been emphatically rejected by every court that has considered the matter. *E.g.*, *Romero* v. *ITE Imperial Corp.*, 332 F.Supp. 523, 526 (D.P.R. 1971); *Isbrandtsen Co.* v. *District 2, Marine Engineers Beneficial Association*, 256 F.Supp. 68, 77 (E.D.N.Y. 1966); *Silverstein* v. *Aetna Life Insurance Co.*, 16 F.Supp. 404, 406 (N.D.N.Y. 1936).

It is especially pertinent that in *Isbrandtsen, supra*, Judge Zavatt, who had decided the *Weinberg* case three

years earlier, specifically rejected plaintiff's suggestion that there was a discretionary power to remand:

> "The union urges the court to remand to the court, despite a finding that it has jurisdiction. It advances a most unusual argument. It agrees that, regardless of the forum, federal law should and will be applied. See Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). It assumes that, despite a finding of federal court jurisdiction, this court has the discretionary power to remand and reminds the court that, should it remand, its order would not be subject to review. 28 U.S.C. §1447(d). What the union wants is an order of remand so as to 'avoid the necessity for ultimate review and the possibility of reversal by the Circuit Court of Appeals were the court to deny the motion to remand.' *Having jurisdiction this court, in my view, has no discretionary power to remand in a case such as this which does not call for the application of the doctrine of abstention.*" *Isbrandtsen, supra* at 77 (emphasis added).

The abstention doctrine referred to by Judge Zavatt is a constitutional law doctrine under which federal courts, though having jurisdiction over a case involving both federal questions and undecided questions of state law, initially refer such a case to the state courts for determination of the state law issues. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16 (1964). No such undecided questions of state law exists in the present case, nor have any constitutional issues been raised. Even if there were doubtful questions of state law in the present case, it would be inappropriate to invoke the abstention doctrine in a simple diversity case merely because some of

the state law questions may be difficult. *Northeastern Pennsylvania National Bank & Trust Co.* v. *Sandvick Steel, Inc.*, 325 F.Supp. 651, 655 (M.D. Pa. 1971).

Finally, it should be emphasized that no general policy of strict construction against the right of removal justifies remand in the case at bar. Thus, Professor Moore, in his treatise discussion of this topic cautions that "[i]f the requirements of the statute are met, *the right to remove is absolute.*" 1A J. Moore, Federal Practice ¶0.157 [1.-3] at 36 n. 30 (emphasis added).

In conclusion, plaintiff has failed to show either that all of the requirements for removal diversity jurisdiction have not been met or that some extrinsic consideration dictates remand to the state court. Plaintiff's whole argument, in fact, seems to center around the assertion that this case is "a question of New York law". Not only is this assertion completely irrelevant, but it impliedly questions the ability of a federal court to apply the law of the state in which it sits. It is respectfully submitted that the District Court justifiably rejected such a specious line of reasoning.

Conclusion

It is our respectful submission that the decision of the District Court was correct and that plaintiff's appeal is utterly without merit. Not only has plaintiff failed to prove that the defendants either are doing business in New York or have transacted business with respect to the contract in suit, but he has also failed to demonstrate that he even understands the meaning of these terms. Plaintiff's contentions in support of remand to the state court have been as vague and as specious as his contentions respecting personal jurisdiction. It is respectfully requested that the decision of the District Court dismissing the complaint be affirmed in all respects.

Respectfully submitted,

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Of Counsel:
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WILLIAM A. KINNAMAN, JR.

In the
UNITED STATES COURT OF APPEALS
for the
Second Circuit

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CLARENCE H. McSHAN, :

Plaintiff-Appellant, :

v. : Docket No. 75-7654

OMEGA LOUIS BRANDT ET FRERE, S.A., :
and SOCIETE SUISSE POUR L'INDUSTRIE
HORLOGERE MANAGEMENT SERVICES, S.A., :

Defendants-Appellees. :

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CERTIFICATE OF SERVICE

WILLIAM A. KINNAMAN, JR., hereby certifies that on March 17, 1976, he served the attached Brief for Defendants-Appellees by personally delivering copies thereof to the office of Solomon M. Lowenbraun, counsel for plaintiff-appellant, at 122 East 42nd Street, New York, New York 10017.

New York, New York
March 17, 1976

William A. Kinnaman, Jr.